Supreme Court, U.S.
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# IN THE SUPREME COURT OF THE UNITED STATES OCTOBER TERM, 1996

Amoco Energy Trading Corporation,
Amoco Production Company,
Anadarko Petroleum Corporation, Conoco Inc.,
Independent Petroleum Association of America and
Marathon Oil Company,

Petitioners,

v.

Federal Energy Regulatory Commission,

Respondent.

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On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the District of Columbia Circuit

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## PETITION FOR A WRIT OF CERTIORARI

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October 31, 1996

223 pp

## QUESTION PRESENTED

Whether the Federal Energy Regulatory Commission can refuse to exercise its jurisdiction over interstate pipeline gathering rates and services pursuant to Sections 4 and 5 of the Natural Gas Act, 15 U.S.C. §§ 717c and 717d, simply by permitting the interstate pipeline to transfer those services to an affiliate.

## PARTIES TO THE PROCEEDING

Pursuant to Rules 14.1(b) and 29.6 of the Rules of the Supreme Court of the United States, Petitioners state as follows:

**Amoco Energy Trading Corporation**

Amoco Energy Trading Corporation is a Delaware corporation with its principal place of business in Houston, Texas. The parent company of Amoco Energy Trading Company is Amoco Production Company which is a wholly owned subsidiary of Amoco Company. Amoco Company is a wholly owned subsidiary of Amoco Corporation. Amoco Energy has no nonwholly owned subsidiaries.

**Amoco Production Company**

Amoco Production Company is a Delaware corporation with its principal place of business in Houston, Texas. The parent company of Amoco Production Company is Amoco Company which is a wholly owned subsidiary of Amoco Corporation. Amoco Production Company has the following nonwholly owned subsidiaries: Azerbaijan International Operating Company, Nile Delta Oil Company, Ekma Oil Company, Gulf Of Suez Petroleum Company, North October Petroleum Company, Rudeis Oil Company, Torsina Oil Company, Termap S.A., Egypt Trans Gas Company, Natural Gas Vehicles Company, East Tanka Petroleum Company, K 10A Production B.V., Statfjord Transport A.S. & Company, K/S Statfjord Transport A.S. & Company, Energia Del Sur S.A., Sharjah LPG Company, Limited, Beacon Gas Limited and East Texas Salt Water Disposal Co.

**Anadarko Petroleum Corporation**

Anadarko Petroleum Corporation ("Anadarko") is a corporation organized under the laws of the State of Delaware, with its principal place of business in Houston, Texas. Anadarko does not have parent companies or nonwholly owned subsidiaries.

**Conoco Inc.**

Conoco Inc. ("Conoco") is a Delaware corporation with its executive offices located in Houston, Texas. The parent company of Conoco is DuPont Energy Company. Conoco has no nonwholly owned subsidiaries.

**Marathon Oil Company**

Marathon Oil Company ("Marathon") is a corporation organized under the laws of the State of Ohio, with its principal place of business in Houston, Texas. The parent company of Marathon is USX Corporation. Marathon has no nonwholly owned subsidiaries.

**Independent Petroleum Association of America**

The Independent Petroleum Association of America ("IPAA") is a national trade association, representing approximately 5,500 individuals and non-integrated oil and natural gas producing companies. IPAA has no parent company and no nonwholly owned subsidiaries.

In addition to the above petitioners, the following were parties to the proceeding below:

Federal Energy Regulatory Commission (Respondent)
ANR Pipeline Company (Intervenor)
Arkansas Royalty Membership (Petitioner)
Associated Gas Services, Inc. (Intervenor)
Commissioner of Public Lands for State of New Mexico (Intervenor)
El Paso Natural Gas Company (Intervenor)
Exxon Corporation (Intervenor)
GPM Gas Corporation (Petitioner)
Interstate Natural Gas Association of America (Intervenor)
Natural Gas Clearinghouse (Intervenor)
New Mexico Energy, Minerals and Natural Resources Department (Intervenor)
NJR Energy Corporation (Intervenor)
Noark Pipeline System, Limited Partnership (Intervenor)
NorAm Field Services Corporation (Petitioner)
NorAm Gas Transmission Company (Petitioner)
Oklahom Independent Petroleum Association (Petitioner)
PanEnergy Gas Services, Inc. (Intervenor)
Panhandle Eastern Pipe Line Company (Intervenor)
Texaco Inc. (Petitioner)
Texaco Natural Gas Inc. (Petitioner)
Trunkline Gas Company (Intervenor)
Vesta Energy Company (Intervenor)
Williams Field Services Company (Intervenor)
Yukon Pacific Company L.P. (Intervenor)

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No. _____

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Amoco Energy Trading Corporation,
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Petitioners,

v.

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Respondent.

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Petition for a Writ of Certiorari to the United States
Court of Appeals for the District of Columbia Circuit

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Amoco Energy Trading Corporation, Amoco Production Company, Anadarko Petroleum Corporation, Conoco Inc., Independent Petroleum Association of America and Marathon Oil Company [hereinafter collectively referred to as "Producer Petitioners"] respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

## OPINIONS BELOW

The opinion of the court of appeals (App. A at 1-34) is reported at *Conoco Inc. v. Federal Energy Regulatory Commission*, 90 F.3d 536 (D.C. Cir. 1996). The opinions of the Federal Energy Regulatory Commission ("FERC" or "Commission") reviewed by the court of appeals are reported at *Arkla Gathering Services Co.*, 67 F.E.R.C. (CCH) ¶ 61,257 (1994) (App. C at 36-103) and *Arkla Gathering Services Co.*, 69 F.E.R.C. (CCH) ¶ 61,280 (1994) (App. D at 104-70).

## STATEMENT OF JURISDICTION

The court of appeals entered its judgment on August 2, 1996 (App. A at 1). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1994) and 15 U.S.C. § 717r(b) (1994).

## STATUTORY PROVISIONS INVOLVED

Section 4 of the Natural Gas Act, 15 U.S.C. § 717c(a) (1994) (App. G at 176), provides in pertinent part that

> [a]ll rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the [Federal Energy Regulatory] Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is

> not just and reasonable is declared to be unlawful.

Section 5 of the Natural Gas Act, 15 U.S.C. § 717d(a) (1994) (App. H at 180), provides that FERC shall have jurisdiction to review, on its own motion or in response to a complaint, the reasonableness of any rate charged by any natural gas company "in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission."

## STATEMENT OF THE CASE

### *A. Supreme Court Precedents Regarding Regulation of Natural Gas Gathering Pursuant to Sections 4 and 5 of the Natural Gas Act.*

As the court of appeals stated in its opinion, App. A at 3,

> [g]athering is the process of taking natural gas from the wells and moving it to a collection point for further movement through a pipeline's principal transmission system.[1]

Shortly after passage of the Natural Gas Act, the Supreme Court was confronted with claims by interstate pipelines that the pipelines could charge whatever they pleased for the production and gathering components in their rates. The

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[1] *Conoco Inc. v. Federal Energy Regulatory Commission*, 90 F.3d 536, 539 n.2 (1996)(citing *Northwest Pipeline Corp. v. Federal Energy Regulatory Commission*, 905 F.2d 1403, 1404 n.1 (10th Cir. 1990)).

pipelines claimed that Section 1(b) of the Natural Gas Act deprived the Federal Power Commission ("FPC") (FERC's predecessor) of jurisdiction over the "production and gathering" of natural gas.[2]

In *Colorado Interstate Gas Co. v. Federal Power Commission*, 324 U.S. 581 (1945), the Supreme Court laid that argument to rest. The Court held that the FPC had jurisdiction to set the rate for the gathering component embedded in interstate pipeline sales rates.[3] *Colorado Interstate*, 324 U.S. at 600-04. (These rates are usually referred to as "bundled" rates that incorporate components for the commodity of gas, for gathering, for transportation and for storage). The Court rejected arguments that Section 1(b) of the Natural Gas Act precluded any such regulation. The Court subsequently reaffirmed its holding in *Interstate*

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[2]Section 1(b) of the Natural Gas Act, 15 U.S.C. § 717(b) (1994) (App. E. at 171-172), provides, in pertinent part, that the Act

> shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale of ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.

[3]*Colorado Interstate* itself involved FPC orders setting the rates of an interstate pipeline (Colorado Interstate) and an allegedly "nonjurisdictional" affiliate (Canadian) which the FPC had held to be operating together as a single entity.

*Natural Gas Co. v. Federal Power Commission*, 331 U.S. 682 (1947). In *Interstate*, the Court noted:

> Unreasonable charges exacted at [the production and gathering] stage of the interstate movement become perpetuated in large part in fixed items of costs which must be covered by rates charged subsequent purchasers of the gas including the ultimate consumer. It was to avoid such situations that the Natural Gas Act was passed.

*Id.* at 693 (footnote omitted).

In the 1980's, FERC induced interstate pipelines to open their transmission systems to those who would compete with the pipeline sales function. One component of that effort was the adoption of regulations in FERC's Order No. 436[4] that required interstate pipelines to "unbundle" or separately state and charge, the components of the pipeline's sales and transportation rates. Gathering charges were one such component.

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[4]Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol, Order No. 436, 50 Fed. Reg. 42,408 (October 18, 1985), FERC Statutes & Regulations [Regulations Preambles] ¶ 30,665 (1985), *order on reh'g*, Order No. 436-A, 50 Fed. Reg 52,217 (December 23, 1985) FERC Statutes & Regulations [Regulation Preambles] ¶ 30,675 (1985), *order on reh'g*, Order No. 436-C, 34 F.E.R.C. (CCH) ¶ 61,404 (1986), *order on reh'g*, Order No. 436-D, 34 F.E.R.C. (CCH) ¶ 61,405 (1986), *order on reh'g*, Order No. 436-E, 34 F.E.R.C. (CCH) ¶ 61,403 (1986), *vacated and remanded sub nom. Associated Gas Distributions v. Federal Energy Regulatory Commission*, 824 F.2d 981 (D.C. Cir. 1987), *cert. denied*, 485 U.S. 1006 (1988).

In response to the FERC's efforts, an interstate pipeline, Northern Natural Gas Company, argued that the fact that gathering charges were separated from the pipeline's sales and transportation rates meant that the pipeline could charge whatever it pleased for natural gas gathering service and could discriminate as it pleased. FERC held that it had jurisdiction to set rates, terms and conditions of gathering service performed by interstate pipelines, and rejected the notion that separately stating a gathering charge somehow deprived FERC of jurisdiction under the Natural Gas Act.[5]

The United States Court of Appeals for the Eighth Circuit affirmed FERC's decision:

> Under the circumstances of this case, which are nearly identical to those of *Colorado Interstate*, § 1(b) does not forbid the Commission from more directly exercising the authority granted in §§ 4 and 5. It is insignificant that transportation rather than sale is the service involved or that the rate for gathering is to be stated separately rather than "bundled." Stating the gathering rate separately from the related jurisdictional transportation rate does not magically "unbundle" the actual gathering activity performed over the pipeline's own facilities in

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[5]*Northern Natural Gas Co.*, 43 F.E.R.C. (CCH) ¶ 61,473, at 62,160-62, *reh'g denied,* 44 F.E.R.C. (CCH) ¶ 61,384, at 62,250-52 (1988).

> connection with continuing interstate transportation.

*Northern Natural Gas Co. v. Federal Energy Regulatory Commission,* 929 F.2d 1261, 1273 (8th Cir. 1991), *cert. denied*, 502 U.S. 856 (1991).[6]

The Eighth Circuit expressly defined the term "the pipeline's own facilities" to encompass facilities owned or controlled by pipeline affiliates. *Id.* at 1263 n.2. Any other reading would let pipelines evade regulation simply by restructuring their operations, putting gathering in separate corporations.

In the wake of the *Northern* decision, interstate pipelines seeking to challenge FERC jurisdiction over gathering rates, terms and conditions of service began to transfer or "spin down" gathering facilities to wholly-owned subsidiaries and affiliated corporations. The FERC permitted one of these transfers to occur, finding that FERC might exercise jurisdiction over the gathering services performed by the pipeline affiliate if any complaints were filed. *Northwest Pipeline Corp.*, 59 F.E.R.C. (CCH) ¶ 61,115, at 61,435, *reh'g denied,* 60 F.E.R.C. (CCH) ¶ 61,213 (1992), *clarified*, 63 F.E.R.C. (CCH) ¶ 61,308 (1993). Cross-appeals of the FERC's orders were dismissed by the United States Court of Appeals for the Tenth Circuit due to an alleged lack of a case

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[6]For decades, in establishing a bundled rate, the FPC and FERC reviewed the separate costs of each of these elements: transmission, storage, production and gathering through the process of cost classification, functionalization and allocation. These individual costs were added together to arrive at a "bundled" rate.

or controversy and alleged lack of aggrievement. *Williams Gas Processing Co. v. Federal Energy Regulatory Commission,* 17 F.3d 1320, 1322-23 (10th Cir. 1994).

In late 1993, the FERC initiated a public conference designed to permit the various segments of the natural gas industry to comment on the future course of FERC's policy over pipeline and pipeline affiliate gathering. *Natural Gas Gathering Services Performed by Interstate Pipelines and Interstate Pipeline Affiliates--Issues Relating to Rates, Terms and Conditions of Service,* 65 F.E.R.C. (CCH) ¶ 61,136 (1993). The FERC's Gathering Service Policy proceeding led to the issuance of the orders on review.

*B. The NorAm Orders Before Federal Energy Regulatory Commission.*

On October 21, 1993, Arkla Gathering Services Company (now NorAm Field Services Corporation, hereinafter "NorAm Field Services") filed a petition for declaratory order in FERC Docket No. CP94-36-000, requesting a determination that certain facilities (hereinafter "subject facilities") intended to be transferred ("spun-down") from Arkla Energy Resources Company (now NorAm Gas Transmission Company, hereinafter "NorAm"), would be gathering facilities and therefore exempt from FERC's licensing jurisdiction under Section 1(b) of the Natural Gas Act, 15 U.S.C. § 717(b) (1994). NorAm Field Services also requested that its gathering rates and services be declared exempt from the Commission's jurisdiction under Sections 4 and 5 of the Natural Gas Act, 15 U.S.C. §§ 717c and 717d (1994).

Requests for rehearing of the May 27 Order were timely filed by, *inter alia*, Indicated Parties.[7] In addition, the Independent Petroleum Association of America ("IPAA") filed a motion to intervene out-of-time in Commission Docket No. CP94-36-000 and requested rehearing of the May 27 Order. By order of July 20, 1994, the Commission granted the requests for rehearing for purposes of further consideration and granted IPAA's motion to intervene out-of-time. *Arkla Gathering Services Co.*, 68 F.E.R.C. (CCH) ¶ 61,096 (1994).

On December 2, 1994, the Commission issued its "Order on Rehearing and Proposed Default Contract, and Deferring Action to Abandonment Application" (hereinafter "December 2 Order") in Commission Docket No. CP94-36-000. *Arkla Gathering Services Co.*, 69 F.E.R.C. (CCH) ¶ 61,280 (1994). FERC held that prior to NorAm's ceasing to provide gathering services through any of the subject facilities, including both the certificated subject facilities and the non-certificated ones, NorAm must be in compliance with

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[7]The Indicated Parties making this filing were Indicated Shippers (Amoco Energy Trading Company, Amoco Production Company, Anadarko Petroleum Corporation, Conoco Inc., Marathon Oil Company, Mobil Natural Gas Inc., Texaco Inc., Texaco Natural Gas Company, and Vastar Resources Inc.) and the Producer-Marketer Transportation Group Gathering Coalition. These parties, with the addition of Vesta Energy Company, concurrently filed a proposed settlement which was rejected by FERC and instead treated as a supplement to the rehearing request. *Arkla Gathering Services Co.*, 69 F.E.R.C. (CCH) ¶ 61,280, at 62,079 & n.18 (App. D at 112), *aff'd*, 70 F.E.R.C. (CCH) ¶ 61,079 (1995) (citing *Michigan Consolidated Gas Co. v. Federal Power Commission*, 283 F.2d 204, 224 (D.C. Cir. 1960), *cert. denied*, 364 U.S. 913 (1960)).

the requirements for a proposed change in service mandated by Section 4(d) of the Natural Gas Act, 15 U.S.C. § 717c(d). *Id.* at 62,082. The Commission reaffirmed that NorAm also must file under Section 7(b) of the Natural Gas Act, 15 U.S.C. § 717f(b), for abandonment authorization for any facilities which were certificated. *Id.* at 62,093-95. The Commission modified its guidelines for a default contract and required NorAm Field Services to file a modified default contract in conformity therewith. *Id.* at 62,093-95. FERC rejected Producer Petitioners' argument that FERC possessed and must exercise jurisdiction over the gathering rates, terms and conditions of service charged by NorAm Field Services. *Id.* at 62,091. FERC held that it would exercise jurisdiction over NorAm Field Services only if that company were found to engage in anticompetitive behavior in conjunction with its pipeline affiliate. *Id.* at 62,087.

*C. The Court of Appeals' Decision.*

The basis for federal jurisdiction in the court of appeals was 15 U.S.C. § 717r(b).

Insofar as is here pertinent,[8] the court of appeals found that *Colorado Interstate* was not controlling due to changed industry circumstances. *Conoco Inc. v. Federal*

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[8]In addition to arguments raised by Producer Petitioners herein, the court of appeals also considered and rejected an argument that the facilities transferred by the pipeline to its affiliate were not "gathering" facilities within the meaning of the Natural Gas Act. That claim is not presented by Producer Petitioners herein.

*Energy Regulatory Commission*, 90 F.3d 536, 546 (D.C. Cir. 1996) (App. A at 17). The court of appeals held that

> [t]he decisions relied on by the Producers predate the massive reorganization of the industry occasioned by Order Nos. 436 and 636, and the Court has not yet addressed many of the jurisdictional issues governing this restructured system.

*Id.* at 545 (App. A at 16-17).

The court of appeals also held that *Colorado Interstate* and *Interstate Natural* were not controlling because both decisions dealt with gathering rates charged by interstate pipelines, rather than gatherers. *Id.* The court of appeals dismissed the *Northern* holding as dictum. *Id.* at 546 (App. A at 18).

The court of appeals found that the FERC's interpretation of its jurisdiction *(i.e.*, that FERC had full rate jurisdiction over pipeline gathering but had no jurisdiction over affiliated gathering unless the affiliate was engaged in anticompetitive behavior in concert with the pipeline) was entitled to *Chevron*[9] deference. *Id.* at 549 (App. A at 24). Accordingly, the court of appeals rejected the challenges to FERC's orders brought by Producer Petitioners. *Id.* at 550 (App. A at 25).

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[9]*Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, *reh'g denied*, 468 U.S. 1227 (1984).

## REASONS FOR GRANTING THE PETITION

### *A. This Case Has Widespread Impact.*

At issue in this case is the scope of federal regulation over literally thousands of miles of gathering facilities throughout the United States. Data filed by an interstate pipeline trade association in connection with FERC's Gathering Service Policy represented that at least 28.7% of the natural gas gathered in the United States was gathered by interstate pipelines or their affiliates.[10] Pipeline and pipeline affiliate gathering provides thousands of producers who may not have any realistic alternatives with access to the national interstate pipeline grid. A single interstate pipeline affiliate gatherer, Williams Field Services Company, reported in connection with the same proceeding that it controlled approximately 5,300 miles of gathering facilities in 7 states, with a net book value of approximately $856 million as of September 30, 1993. The orders at issue in this proceeding countenance a widespread and sweeping withdrawal of jurisdiction over rates, terms and conditions of service regulated by the FERC pursuant to longstanding precedents of this Court.[11]

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[10]Interstate Natural Gas Association of America, Gathering: Practice and Policy Under Open-Access Transportation, Report No. 93-3, at 11 (October 1993) (filed in FERC Docket No. RM94-4-000).

[11]*See, e.g., Williams Natural Gas Co. and Williams Gas Processing-Mid-Continent Region Co.*, 74 F.E.R.C. (CCH) ¶ 61,103 (1996), *reh'g denied*, 75 F.E.R.C. (CCH) ¶ 61,274 (Williams Natural Gas Company was granted authorization to abandon 41 separate gathering systems which total approximately 801 miles of varying diameter pipeline to Williams Gas Processing-Mid-Continent Region

An appeal raising the same or similar issues as were presented to the court of appeals below is presently pending before the Fifth Circuit.[12] *See Pacific Gas & Electric Co. v. Federal Energy Regulatory Commission*, No. 96-60036 (5th Cir. filed February 1, 1996). In addition, other proceedings raising the same or similar issues are still pending before FERC.

*B. The Court of Appeals Erred in Permitting De Facto Deregulation of Interstate Pipeline Gathering Rates.*

It is the duty of FERC to ensure that the rates, terms, and conditions of all services provided by interstate pipelines in connection with the transportation of natural gas in interstate commerce, including gathering services, are just and reasonable and non-discriminatory pursuant to Sections 4 and 5 of the Natural Gas Act, regardless of whether some facilities and services have been spun-down to an affiliate.

Absent an Act of Congress, FERC cannot deregulate the gathering services provided by interstate natural gas pipelines, whether or not spun-down to affiliates, in connection with the transportation of natural gas in interstate

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Company. Williams Natural Gas Company estimated the net book value at approximately $7.3 million.)

[12]Several additional related cases are pending in the United States Court of Appeals for the District of Columbia Circuit. Another appeal raising similar but not identical issues is pending before the United States Court of Appeals for the Tenth Circuit. *First National Oil, Inc. v. FERC*, No. 95-9531 (10th Cir. filed July 7, 1995).

commerce. FERC cannot ignore the Natural Gas Act or "deregulate" service subject to the Natural Gas Act on its own. *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 131-34 (1990) ("*Maislin*"). Deregulation lies within the exclusive domain of Congress. Nonetheless, deregulation is effectively what FERC has done. The FERC's policy allows interstate pipelines to nullify the Natural Gas Act by the simple expedient of creating an "affiliate," and spinning down gathering facilities to that affiliate. It is for Congress to determine whether a change in industry circumstances warrants a change in a federal statute.[13]

This Court, in *MCI Telecommunications Corp. v. AT&T Co.*, 512 U.S. 218 (1994), specifically rejected an attempt to charge rates not on file with the Federal Communications Commission ("FCC"). The FCC had adopted a program of "permissive detariffing" in which it would, with respect to non-dominant carriers, forbear from enforcing the rate filing requirements which § 203 of the Communications Act imposed on every communications common carrier. This Court specifically rejected the FCC's detariffing proposal because § 203(a) provides that "every"

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[13]In its 1954 *Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672, 677 (1954), decision, the Court affirmed the FPC's extension of federal regulation to producer wellhead sales for resale of natural gas. Two acts of Congress (the Natural Gas Policy Act, 15 U.S.C. § § 3301, *et seq.* and the Natural Gas Wellhead Decontrol Act of 1989, Pub. L. No. 101-60, 103 Stat. 157 (codified in scattered sections of 15 U.S.C. (1989))) were required to remove wellhead pricing from FERC's jurisdiction. In the orders on review, FERC seeks to withdraw federal regulations of interstate pipeline gathering with no statutory mandate whatsoever.

carrier "shall" file its tariff. Even though § 203(b) provides the FCC with authority to "modify any requirement" of § 203, this Court held that elimination of the tariff filing requirement went beyond modification and, hence, beyond the FCC's authority. *Id.* at 2231.

The language of Section 4 of the Natural Gas Act, 15 U.S.C. § 717c, mandates that FERC regulate rates for or in connection with interstate transmission of natural gas, and includes the requirement that those rates and tariffs for such services be filed with FERC. Just as the Interstate Commerce Commission ("ICC") in *Maislin* and the FCC in *MCI* did not have the statutory authority to allow the regulated entity to avoid the requirement of filing rates, so too FERC lacks the statutory authority to allow interstate pipelines or their gathering affiliates to avoid the requirement of filing rates for gathering services in connection with transportation subject to the jurisdiction of FERC.

Since it has been established that FERC has both Section 4 and Section 5 jurisdiction over the gathering rates charged by interstate pipelines and their gathering affiliates, FERC must also require that the rates charged for gathering be just and reasonable according to the mandate contained in Section 4(a) of the Natural Gas Act:

> All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or

> charges, shall be just and reasonable, and any such rate or change that is not just and reasonable is declared to be unlawful.

15 U.S.C. § 717c(a) (App. G. at 176).

The Supreme Court in *Federal Power Commission v. Texaco Inc.*, 417 U.S. 380 (1974) ("*Texaco*"), upheld a court of appeals rejection of the FPC's contention that the "just and reasonable" standard was not mandatory and that the FPC could choose not to regulate rates over which it had jurisdiction. The Court stated:

> Whatever the position of the Commission heretofore has been, it wisely does not challenge that aspect of the Court of Appeals judgment. Sections 4 and 5 of the [Natural Gas] Act require that all gas rates be just and reasonable.

*Id.* at 394.

*Colorado Interstate* and *Northern* established that the interstate pipeline gathering rates and services at issue in this case are subject to FERC jurisdiction under the Natural Gas Act. FERC cannot disclaim its obligation to regulate affirmatively when such services are provided by an interstate affiliate rather than by the pipeline itself. The court of appeals erred in permitting it to do so.

*C. The Court of Appeals' Decision Conflicts with Northern.*

In *Northern,* the United States Court of Appeals for the Eighth Circuit acted to eliminate an obvious opportunity for interstate pipelines to circumvent federal jurisdiction over their gathering rates by transferring gathering facilities and services to affiliated corporations. In so doing, the Eighth Circuit acted in a manner fully consistent with the Court's governing *Colorado Interstate* decision, which itself involved federal regulation of gathering rates charged by an allegedly nonjurisdictional pipeline affiliate. The Eighth Circuit correctly affirmed the FERC's jurisdiction extended to regulation of interstate pipeline gathering services performed in connection with jurisdictional transmission service. Producer Petitioners submit that the court of appeals erred in disregarding *Northern* and *Colorado Interstate.* No realistic possibility exists of resolving this conflict in the absence of review by the Court.

*D. The Court of Appeals' Decision Misapplied the Chevron Doctrine.*

In holding that the FERC's construction of the scope of its jurisdiction over pipeline affiliate gathering was entitled to *Chevron* deference, the court of appeals found that the opinions of the Court relied upon by Producer Petitioners were not controlling due to claimed changed industry circumstances. *Conoco*, 90 F.3d at 549. The court of appeals erred in this regard. Once the Court has declared the meaning of a statute, the agency's decision must be evaluated against that settled law. *Maislin,* 497 U.S. at 131; *Neal v. United States,* 116 S.Ct. 763, 769 (1996) ("*Neal*"); *Lechmere,*

*Inc. v. National Labor Relations Board*, 502 U.S. 527, 536-38 (1992). An administrative agency such as FERC cannot be entitled to *Chevron* deference when its decision is at odds with controlling Supreme Court precedent, in this case, *Colorado Interstate*.

In this respect, the implications of the court of appeals' decision, unless reviewed by the Court, have wide-ranging significance that extends to judicial review of all administrative agency actions.

The Court's recent opinions clarify that an agency is not entitled to discard the Court's interpretations of a statute's meaning based on the agency's perceptions of public policy or changed industry conditions. In *Maislin*, the ICC claimed that it was permitted to allow a regulated carrier to charge a rate below the rate on file with the agency. The ICC claimed that its construction of the statute was rational, consistent with the statute, and entitled to *Chevron* deference. 497 U.S. at 130.

The Court rejected the ICC's contention, noting that the ICC's interpretation of the statute had been rejected in the Court's 1908 decision in *Armour Packing Co. v. United States*, 209 U.S. 56, 81 (1908). The Court explained:

> Once we have determined a statute's clear meaning, we adhere to that determination under the doctrine of *stare decisis*, and we judge an agency's later interpretation of the statute against our prior determination of the statute's meaning.

*Maislin*, 497 U.S. at 131.

The Court further explained the rationale for this doctrine in *Neal*:

> Even so, Congress, not this Court, has the responsibility for revising its statutes. Were we to alter our statutory interpretations from case to case, Congress would have less reason to exercise its responsibility to correct statutes that are thought to be unwise or unfair.

*Neal*, 116 S.Ct. at 769.

The court of appeals' decision at issue permitted FERC to deviate from longstanding Supreme Court precedent never modified by Congress. In so doing, the court of appeals misapplied the *Chevron* doctrine.

### *E. The Court of Appeals Erred in Giving Undue Deference to the Formal Corporate Status of Interstate Pipeline Gathering Affiliates.*

The FERC and the court of appeals attempt to defend FERC's abdication of jurisdiction based only on an empty formalism: the contention that the gathering affiliate of an interstate pipeline "taking control" of the pipelines' gathering facilities and services is not a "natural gas company." In this respect, the decisions of FERC and the court of appeals are inconsistent with FERC's own precedents and controlling federal case law.

In stark contrast to the orders on review, FERC recently has determined in cases that do not involve "gathering" that FERC's jurisdiction over the transportation of natural gas cannot be defeated through the use of affiliates. *KansOk Partnership,* 73 F.E.R.C. (CCH) ¶ 61,160 at 61,484-88, *order granting stay, in part,* 73 F.E.R.C. (CCH) ¶ 61,293 (1995), *clarified,* 75 F.E.R.C. (CCH) ¶ 61,264 (1996); *Louisiana Gas System Inc. v. Panhandle Eastern Corp.,* 73 F.E.R.C. (CCH) ¶ 61,161, at 61,500-03 (1995), *reh'g denied,* 75 F.E.R.C. (CCH) ¶ 61,027 (1996). Both of these cases involved construction of coordinated allegedly "intrastate" pipeline segments held by separate corporate subsidiaries which, when viewed as a whole, were found to be interstate pipeline systems.

The United States Court of Appeals for the District of Columbia Circuit, in a decision issued only three weeks after the decision under review, cited the *Conoco* case. Ironically, the *Conoco* case was cited for the proposition that the "Commission may treat jurisdictional pipeline and nonjurisdictional gatherer as a single entity when services are tied. . . " *Altamont Gas Transmission Co. v. Federal Energy Regulatory Commission,* 92 F.3d 1239, 1245 (D.C. Cir. 1996).

Federal case law also recognizes that FERC should not give blind deference to corporate formalities in the exercise of its statutory responsibilities. As noted above, *Colorado Interstate* itself involved the exercise of FPC jurisdiction over allegedly "separate" corporations. Moreover, as the Court held in *Southern Pacific Terminal Co. v. Interstate Commerce Commission,* 219 U.S. 498 (1911), in

interpreting the scope of jurisdiction over allegedly "nonjurisdictional" corporate affiliates under the Interstate Commerce Act:

> Another and important fact is the control of the properties by the Southern Pacific Company through stock ownership. There is a separation of the companies if we regard only their charters; there is a union of them if we regard their control and operation through the Southern Pacific Company. This control and operation are the important facts to shippers. It is of no consequence that by mere charter declaration the Terminal Company is a wharfage company or the Southern Pacific a holding company. Verbal declarations cannot alter the facts. The control and operation of the Southern Pacific Company of the railroads and the Terminal Company have united them into a system of which all are necessary parts. . . .
>
> And surely a system so constituted and used as an instrument of interstate commerce may not escape regulation as such because one of its constituents is a wharfage company and its dominating power a holding company. As well said by the Interstate Commerce Commission, "a corporation such as this Terminal Company, which has 'competing lines,' should not be permitted to defeat the jurisdiction of this Commission by showing

> that it is not in fact owned by any railroad company. . . . The Terminal Company is part and parcel of the system engaged in the transportation of commerce, and to the extent that such commerce is interstate the Commission has jurisdiction to supervise and control it within statutory limits. To hold otherwise would in effect permit carriers generally, through the organization of separate corporations, to exempt all of their terminals from our regulating authority."

*Id.* at 521-22.

Lower federal courts have also held that, for regulatory purposes, the activities of allegedly non-jurisdictional affiliates may be imputed to their jurisdictional parent. *See General Telephone Co. v. United States,* 449 F.2d 846, 855 (5th Cir. 1971); *Mansfield Journal Co. v. Federal Communications Commission*, 180 F.2d 28, 36-37 (D.C. Cir. 1950).

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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